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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 734

KENNETH C. HITCHCOCK, ET AL.,
Appellants,

VS.

HENRY T. COLLENBERG, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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Appellees in the above entitled case move to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

SUPPORTING BRIEF

In support of the aforegoing motions, the Appellees make the following statements:

Statement of Case

The Appellants in this suit filed a complaint in the United States District Court for the District of Maryland against the Appellees in the Appellees' official capacity as

officers of the State of Maryland. They alleged that one of the Appellants, Kenneth C. Hitchcock, a resident of the State of Maryland, had been continuously engaged in the practice of naturopathy in the State of Maryland since 1938. They set forth numerous views and interpretations on their part of what naturopathy is, and averred that the Appellees, who are members of the medical licensing boards of Maryland, had refused to issue a license to Kenneth C. Hitchcock for the practice of naturopathy, because he did not meet the requirements of the Medical Practice Act of the State of Maryland for the licensing of physicians. They alleged that the other Appellees, namely: the Attorney General of Maryland, the State's Attorney for Baltimore City and the Police Commissioner of Baltimore City were charged with the duty of enforcing the Medical Practice Act. Before the hearing of the case, the State had commenced criminal proceedings under the Act against the Appellant Hitchcock, and pleadings were amended. They asked the Court to declare the Maryland Medical Practice Act to be in violation of the Laws and Constitution of the United States and in violation of the Laws and Constitution of the State of Maryland; they asked the Court to construe the meaning of the Medical Practice Act in Maryland; they asked the Court to decree that the practice of naturopathy in the State of Maryland should be confined to trained naturopaths, and that the practice should not be engaged in by practitioners of any other healing faith; sought a declaratory decree that naturopathy was a separate and distinct branch of the healing arts entirely beyond the scope of the Medical Practice Act of the State of Maryland, namely, Sections 116 through 144C of Article 43 of the Annotated Code of Maryland; they asked for a temporary and a permanent injunction to restrain the Appellees from attempting to enforce the statute, civilly and criminally, and

further asked that the Court determine whether the Medical Practice Act was in fact invalid in whole or in part.

Two of the Appellants, namely, Mary S. Gebhardt, who was a resident of the State of Pennsylvania, and Lewis Kern, who was a resident of the State of Ohio, asked that the Court grant Kenneth C. Hitchcock the privilege of practicing naturopathy within the State of Maryland in order that they might be treated by him in the State, he being the person of their choice to treat their ailments. They asked that they be permitted to select the form of healing art of their choice, in the State of Maryland, claiming that their constitutional rights were being violated because they were not being permitted to do so.

State law construed by a State Court is followed by Federal Court when no violation of Federal Constitution is involved.

The Appellants asked the Trial Court to construe the laws of the State of Maryland. When construing the laws of a State, the Federal courts are bound by the decision of the highest appellate court of that State, as to the meaning of the laws of that State, assuming there is no question involved as to the violation of the Federal Constitution.

Title 28 U.S.C.A. Sec. 1652 reads as follows:

> "*State laws as rules of decision.* The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

In *Erie Railroad v. Tompkins*, 304 U.S. 64 at 78, 82 L. Ed. 1188 at 1194, the Supreme Court of the United States said:

> "Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be ap-

plied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *"

See also *Watson v. Maryland*, 218 U.S. 173 at 175.

Section 138 of Article 43 of the Annotated Code of Maryland (1951 Ed.) reads as follows:

"Any person shall be regarded as practicing medicine within the meaning of this sub-title who shall append to his or her name the words or letters 'Dr.', 'Doctor', 'M.D.', or any other title in connection with his name, with the intent thereby to imply that he or she is engaged in the art or science of healing, or in the practice of medicine in any of its branches, or who shall operate on, *profess to heal, prescribe for, or otherwise treat any physical or mental ailment or supposed mental ailment of another*, or who shall for hire or for any gratuity or compensation, either directly or indirectly to him or her paid, *undertake by any appliance, operation or treatment of whatever nature, to cure, heal or treat any bodily or mental ailment or supposed ailment of another;* or who for any hire, gratuity or compensation, either directly or indirectly to him or her paid, by or for any patient, shall undertake to *treat, heal, cure, drive away or remove any physical or mental ailment, or supposed ailment of another, by mental or other process exercise or invoked on the part of either the healer or the patient or both;* but nothing herein contained shall be construed to apply to gratuitous services, nor to any resident or assistant resident physicians or students at hospitals in the discharge of their hospital or dispensary duties, or in the

office of physicians, or to any physician or surgeon from another State, territory or district in which he resides when in actual consultation with a legal practitioner of this State; or to commissioned surgeons of the United States army, or navy, or insane hospital service, or opticians or chiropodists, or to midwives, or to masseurs, or other manual manipulators who use no other means; nor shall the provisions of this subtitle apply to physicians or surgeons residing on the borders of a neighboring State, and duly authorized under the laws thereof to practice medicine or surgery therein, whose practice extends into the limits of this State; provided, that such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this State without complying with the provisions of this sub-title; provided, that the same privileges be accorded to licensed physicians of this State; provided, further, that nothing in this sub-title shall annul any of the provisions of article 32, title 'Dentistry', nor shall apply to any registered graduate of dental surgery now practicing in the said State of Maryland, with the sign titles: Dentist, surgeon dentist, dental surgeon, or stomatologist; and provided further, that nothing herein contained shall be so construed as to prevent or in any way make unlawful or interfere with the sale by manufacturing, wholesale or retail druggists, or any persons dealing in drugs or medicines of any proprietary or patent medicine or any official or standard drug or medicine." (Emphasis supplied.)

The Court of Appeals of Maryland, the court of last resort in the State, has previously decided all the points concerning the interpretation of State Laws raised by the Appellants. In *Aitchison v. State*, 204 Md. 538 (cert. den. by the Supreme Court, 348 U.S. 880), the Court said at p. 545:

"Section 138 of the Medical Practice Act now defines a practitioner of medicine as follows:

> 'Any person shall be regarded as practicing medicine within the meaning of this sub-title who shall append to his or her name the words or letters "Dr.", "Doctor", "M.D.", or any other title in connection with his name, with the intent thereby to imply that he or she is engaged in the art or science of healing, or in the practice of medicine in any of its branches, or who shall operate on, profess to heal, prescribe for, or otherwise treat any physical or mental ailment or supposed mental ailment of another, or who shall for hire or for any gratuity or compensation, either directly or indirectly to him or her paid, undertake by any appliance, operation or treatment of whatever nature, to cure, heal or treat any bodily or mental ailment or supposed ailment of another; or who for any hire, gratuity or compensation, either directly or indirectly to him or her paid, by or for any patient, shall undertake to treat, heal, cure, drive away or remove any physical or mental ailment, or supposed ailment of another by mental or other process, exercised or invoked on the part of either the healer or the patient or both; * * *'
>
> "It is absolutely clear from the definite language of the statute that the Legislature intended 'practice of medicine' to include not only the application of medicine to patients, but any practice of the art of healing disease and preserving the health other than those special branches of the art that were expressly excepted."

At page 550, the Court said:

> "It was argued by appellant in the instant case that, since the Legislature had expressly provided for special licensing of osteopathy, chiropody, and chiropractic, and had made no provision for the licensing of naturopaths, it should be inferred that naturopaths may practice without a license. We cannot accept that contention. As appellant stated, bills have been introduced in the Legislature to permit and regulate the practice

of naturopathy. The very fact that no such legislation has been passed indicates that the Legislature has not intended thus far to permit naturopaths to practice without a license. The Legislature has been careful to prevent medical treatments without the protection afforded by some official regulatory board. The law now demands a license for hair dressers and beauty culturists. Secs. 490-516. A certificate of registration may be obtained for the practice of trichology, which is defined as 'the massaging, cleansing, stimulating, exercising or similar work upon the scalp, by the use of mechanical or electrical apparatus or appliances, or cosmetics, preparations, tonics, antiseptics, creams or lotions, or by other means.' Sec. 495.

"In view of the solicitude which the Legislature has displayed for the protection of the health of the people, the breadth of the language it has employed to define the practice of medicine, and its failure to exempt naturopaths from the definition, we are compelled to hold that the Medical Practice Act prohibits a person desiring to engage in the healing art by the practice of naturopathy from doing so without a license from the State Board of Medical Examiners. * * *"

Appellant also asked the Federal District Court to declare that the Maryland Medical Practice Act violated the Maryland Constitution, but the Court of Appeals of Maryland, the court of last resort in the State, has decreed that the Medical Practice Act is constitutional under the terms of the Constitution of the State of Maryland. *Aitchison v. State, supra; Watson v. State,* 105 Md. 650.

The trial court was without jurisdiction to consider the questions concerning the interpretation of the State Laws and the State Constitution, and rightfully refused to decide those points. If they had decided them they would have had to follow the decisions of the Maryland Court of Appeals.

The Maryland Medical Practice Act does not Violate the Anti-Trust Laws.

The Appellants also alleged that the Maryland Medical Practice Act, as interpreted and enforced by the courts of the State of Maryland, violated the provisions of Title 15 U.S.C.A. Secs. 1 through 27 and 44, in that it created a monopoly. Title 15 U.S.C.A. applies only to restraints placed upon interstate commerce by individuals, and does not apply to restraints placed upon interstate commerce by States or to restraints upon commerce which are entirely intrastate in nature.

In *Alabama Independent Service Station Asso., Inc. v. Shell Petroleum Corp.*, 28 Fed. Supp. 384, the Court held that the Federal Anti-Trust Acts only applied to acts which were in restraint of interstate commerce.

In *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, the State of California, by legislation, restricted the interstate movement of raisins from the grower to the packer. The question arose as to whether or not the restriction placed by the State on the movement of the raisins was a violation of the Sherman Anti-Trust Act. The Court, at p. 350 of U.S. 317 said:

> "* * * We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain

> state action or official action directed by a state. The Act is applicable to 'persons' including corporations (§7), and it authorizes suits under it by persons and corporations (§15). * * *"

In *United States v. E. C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, the Court said:

> "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion', is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. * * *"

The control by a State of the practice of medicine, by licensing within the State only those who are qualified to practice is not a regulation of interstate commerce. It is a regulation only of commerce within the geographical boundaries of the State. The regulation of the licensing of qualified practitioners does not in any way create a monopoly. Anyone who is qualified to do so may take the examination and, upon successfully passing it, become a licensed practitioner in the State. The Appellant Hitchcock

has the same rights as all others, and if qualified, may practice medicine in this State. He has been subjected to no greater hazard than any other individual who attempts to practice medicine without a license.

One of the Appellants is the Maryland Naturopathic Association, Inc., a body corporate. It, as such, cannot itself practice medicine or naturopathy and has no property interest which may be affected by any of the alleged acts on the part of the Appellees to this cause and, accordingly, it has no right to enter into this suit, as a party plaintiff, against the Defendants. It had no right to complain of an action on the part of an official of the State which did not affect it, but might affect the property rights of the individual members of the corporation. In *Alabama Independent Service Station, Inc. v. Shell Petroleum Corp., supra,* the Court, in holding that the Association had no right to be a party plaintiff in that suit, said:

> "Capacity of the Association Corporation which is a plaintiff here, to sue generally is not questioned, but its capacity to enforce the separate property rights of its individual members seems unfounded in any authority of law."

See also *Clark v. Chase National Bank of the City of New York,* 45 Fed. Supp. 820; *Maryland Naturopathic Asso. v. Kloman,* 191 Md. 626 at 630; *Dvorine v. Castelberg Jewelry Corp.,* 170 Md. 661, 668.

The Maryland Act does not Violate the Fundamental Rights Guaranteed by the Federal Constitution.

Appellants also claimed that there was jurisdiction in the trial Court under Title 42 U.S.C.A., Secs. 1983 and 1985 (formerly Title 8 U.S.C.A., Sec. 47), since they claimed to have been deprived of rights, privileges and immunities secured to them by the Constitution and laws of the United

States. Under the Medical Practice Act of the State of Maryland, the Appellants have had the equal protection of the law. They were protected in the same manner as every other citizen of the State of Maryland, or every citizen of a foreign State of the United States. They were not deprived of any rights without due process of law as there is no inherent right in any individual to follow a particular profession. It is well established by the decision of the courts of the United States and of the courts of the States of the United States that the States may regulate those callings or professions which concern the public health, and that there is no violation of constitutional rights as long as they do not act unreasonably in doing so.

In the case of *Dent v. West Virginia,* 129 U.S. 114, 32 L. Ed. 623, the Court said:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice

in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the Legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications."

In *Barsky v. Board of Regents*, 347 U. S. 442, at 449, the Court said:

> "It is elemental that a State has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of the State's police power. The State's discretion in that field extends naturally to the regulation of all professions concerned with health."

In *Semler v. Oregon*, 294 U.S. 608, 79 L. Ed. 1086, the appellant challenged the constitutionality of an Oregon statute imposing restrictions on advertising by dentits. In over-

ruling each contention of the appellant, Mr. Chief Justice Hughes, speaking for the Court, said:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

In *Graves v. Minnesota*, 272 U.S. 425, 71 L. Ed. 331, the State of Minnesota passed a statute prohibiting the practice of dentistry by persons who had not been licensed by a Board of Dental Examiners, and required that every applicant for a license show that he had been granted a diploma from a dental college of good standing. Graves had applied for a license but was refused an examination by the Board because he had no diploma from an accredited dental college. He attacked the constitutionality of the statute. The Court in that case said:

> "It is well settled that a state may, consistently with the 14th Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learn-

ing and skill shall practice medicine or dentistry. Dent v. West Virginia, 129 U.S. 114, 122, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; Douglas v. Noble, 261 U.S. 165, 167, 67 L. ed. 590, 592, 43 Sup. Ct. Rep. 303. * * *"

"* * * And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. Great Northern R. Co. v. Minnesota, 246 U.S. 434, 439, 62 L. ed. 817, 819, 38 Sup. Ct. Rep. 346; Gitlow v. New York, 268 U.S. 652, 668, 69 L. ed. 1138, 1146, 45 Sup. Ct. Rep. 625.

* * * * * *

"This conclusion is in harmony with the decisions in other state courts involving the constitutional validity of statutes regulating the practice of medicine or dentistry which contain similar or analogous provisions, as well as with the earlier Minnesota decisions. Re Thompson, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149; State v. Creditor, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346; State ex rel. Walker v. Green, 112 Ind. 462, 14 N.E. 352; People v. Phippin, 70 Mich. 6, 37 N.W. 888; Ex parte Spinney, 10 Nev. 323; State v. Vandersluis, 42 Minn. 129, 6 L.R.A. 119, 43 N.W. 789; State v. Graves, 161 Minn. 422, 201 N.W. 933. And see Hewitt v. Charier, 16 Pick. 353; Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; Wert v. Clutter, 37 Ohio St. 347; Timmerman v. Morrison, 14 Johns. 369. * * *"

In *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 95 L. ed. 1317 at 1324, the Court said:

" 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary

> avocations of life.' (U.S.) 4 Wall at 379, 380. See also Cummings v. Missouri, supra ((U.S. 4 Wall at 318, 319, 18 L. ed. 361, 362)). This doctrine was reaffirmed in Dent v. West Virginia, 129 U.S. 114, 32 L. ed. 623, 9 S. Ct. 231 (1889), in which Mr. Justice Field, who had written the Cummings and Garland opinions, wrote for a unanimous Court upholding a statute elevating standards of qualification to practice medicine. And in Hawker v. New York, 170 U.S. 189, 42 L. ed. 1002, 18 S. Ct. 573 (1898), the Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony. Both Dent and Hawker distinguished the Cummings and Garland cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it."

See also *Watson v. Maryland*, supra; *Williams v. Arkansas*, 217 U.S. 79; *Hawker v. United States*, 170 U.S. 189.

The recent cases of *Taylor v. Oklahoma*, 1 L. Ed. 2d 38; and *Dantzler v. Callison*, 1 L. Ed. 2d 235, which were similar in nature, were dismissed without hearing.

In *State v. Henning*, 83 Ohio App. 445, 78 N.E. 2d 588, the appellant was charged with practicing medicine without a license. The statute provided that "A person shall be regarded as practicing medicine * * * who examines or diagnoses for a fee or compensation of any kind, or prescribes, advises, recommends, administers or dispenses for a fee or compensation of any kind, direct or indirect, a drug or medicine, appliance, application, operation, or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease * * *." The prosecuting witness testified that appellant prescribed medicine for her and that he injected oxygen into her leg. The appellant contended that he was not practicing medicine in

any of its branches, but was practicing naturopathy. The court said:

> "* * * We are not interested in what name or title the appellant gives to his profession, but we are only interested in whether or not what he did constituted the practice of medicine as defined by G.C. Section 1286 * * *."

And further:

> "Another error assigned is that the Court erred in rejecting evidence offered by the defendant by which he attempted to explain the difference between medicine and naturopathy. This evidence was properly rejected, we think, because as we stated previously we are not interested in what constitutes naturopathy, but only in what constitutes the practice of medicine * * *."

An appeal to the Supreme Court of Ohio was dismissed in *State, Appellee v. Henning, Appellant,* 150 Ohio St. 48, 80 N.E. 2d 164.

In *Crum v. State Board of Medical Registration and Examination,* 219 Ind. 191, 37 N.E. 2d 64, the Court said that:

> "Licenses to practice chiropractic, naturopathy, and electrotherapy may be said to be limited licenses to practice medicine, * * *."

In Louisiana, *State Board of Medical Examiners v. Fife,* 162 La. 681, 111 Sou. 58, 54 A.L.R. 594, it was contended that a Louisiana law was unconstitutional because it required chiropractors to study subjects which were outside the scope of their practice. In overruling the contentions made against the law, the court observed that no person has a natural or absolute right to practice medicine or surgery, but that the right is granted to those who meet the requirements of law; and that the Legislature, in defining the requirements may not prescribe, as a condition to the right to

practice, knowledge of a subject which bears no relation to the practice of medicine. The court continued:

> "Our conclusion is that plaintiffs have no constitutional grounds to complain, by reason of the fact that, before being permitted to treat the sick, they must make it appear, in the manner prescribed by law, that they have an adequate knowledge of materia medica and surgery, and of the remaining subjects, required by sec. 2 of Act 56 of 1914, as amended by sec. 2 of Act 54 of 1918, quoted above. While materia medica and surgery are not used in the chiropractic system, still they, as well as the other subjects required by the act, as amended, bear a relation to the practice of medicine as to general science and that, in view of the fact that the legislature is not bound to recognize every school of medicine, and deal with it as such, is sufficient to prevent the act from being unconstitutional."

The judgment in this case was affirmed by the Supreme Court of the United States, in *Fife v. Louisiana, etc.*, 274 U.S. 720, 71 L. Ed. 1324, 47 S. Ct. 590. The per curiam order of the Supreme Court was:

> "Affirmed on the authority of Dent v. West Virginia, 129 U.S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Douglas v. Noble, 261 U.S. 165, 67 L. ed. 590, 43 Sup. Ct. Rep. 303; and Graves v. Minnesota, 272 U.S. 425, ante, 331, 47 Sup. Ct. Rep. 122."

See also *Mitchell v. Greenough*, 100 Fed. 2d 184, which dealt with the practice of law, wherein the Court said, at p. 185:

> "* * * We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws. Bradwell v. State of Illinois, 16 Wall. 130, 21 L. Ed. 442; Ex parte Lockwood, 154 U.S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. * * *"

Two of the Appellants in this cause were non-residents of the State of Maryland, namely: Mary S. Gebhardt, who

was a resident of the State of Pennsylvania, and Lewis Kern, a resident of the State of Ohio. The other Appellants were residents of the State of Maryland. The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Under the above Section of the United States Constitution, a State is not subject to suit in any court by a resident of another or a foreign State unless it consents to be sued. A citizen of a State may not sue the State in any court because of the inherent nature of sovereignty.

In *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 88 L. Ed. 1121 at 1124, the Court said:

> "This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. Chandler v. Dix, 194 U.S. 590, 48 L. ed. 590, 24 S. Ct. 766; Fitts v. McGhee, 172 U.S. 516, 529, 43 L. ed. 535, 541, 19 S. Ct. 269; Murray v. Wilson Distilling Co., 213 U.S. 151, 167, 53 L. ed. 742, 750, 29 S. Ct. 458; Lankford v. Platte Iron Works Co., 235 U.S. 461, 468, et seq., 59 L. ed. 316, 318, 35 S. Ct. 173; Re New York, 256 U.S. 490, 500, 65 L. ed. 1057, 1062, 41 S. Ct. 588; Worcester County Trust Co. v. Riley, 302 U.S. 292, 296, 299, 82 L. ed. 268, 273, 275, 58 S. Ct. 185. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. Monaco v. Mississippi, 292 U.S. 313, 320, 78 L. ed. 1282, 1284, 54 S. Ct. 745; Louisiana v. Jumel, 107 U.S. 711, 720, 27 L. ed. 448, 451, 2 S. Ct. 128. A

state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. Hans v. Louisiana, 134 U.S. 1, 10, 16, 33 L. ed. 842, 845, 847, 10 S. Ct. 504."

In *Missouri v. Fiske*, 290 U.S. 18, 78 L. Ed. 145, at 149, the Court said:

> "*Second.* The Eleventh Amendment is an explicit limitation of the judicial power of the United States. 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State. However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' Re New York, 256 U.S. 490, 497, 65 L. ed. 1057, 1060, 41 S. Ct. 588. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. Hans v. Louisiana, 134 U.S. 1, 10, 33 L. ed. 842, 845, 10 S. Ct. 504; Palmer v. Ohio, 248 U.S. 32, 34, 63 L. ed. 108, 109, 39 S. Ct. 16; Duhne v. New Jersey, 251 U.S. 311, 313, 314, 64 L. ed. 280, 281, 40 S. Ct. 154."

In *Gallena v. Scott* (N.J.), 94 A. 2d 312 at 315, the Court said:

> "Immunity from suit without consent, signified by legislative action or waiver, is an attribute of sovereignty. The principle may not be subverted by indirection. The immunity is grounded in the strongest considerations of public policy, related to the security of the government and its administrative integrity. Fitts v. McGhee, 172 U.S. 516, 19 S. Ct. 269, 43 L. Ed.

> 535 (1899). Where the substantial rights of the State would be directly and adversely affected if there were judgment according to the demand made, the State is a necessary party defendant, and if it cannot be made a party, for want of consent to be sued, then the suit is not maintainable. Schwing v. Miles, 367 Ill. 436, 11 N.E. 2d 944, 113 A.L.R. 1504 (Sup. Ct. 1937). The question is whether the suit is in reality against the State itself, as a means of controlling its action or imposing a liability."

Suit against the officers of a State to keep them from performing their duties is a suit against the State. See *Fitts v. McGhee,* 172 U.S. 532; *Gallena v. Scott,* supra. In order to maintain an action to enjoin officers of a State in the performance of their duties, a complainant must show that immediate and irreparable damage will be done to him. Federal courts will not issue injunctions to restrain the action of State officers on the mere ground that the officers are acting unconstitutionally, or to prevent the bringing of suits in the State court, or to prevent the enforcement of Criminal State statutes claimed to be unconstitutional. There must be exceptional circumstances, a clear showing of the existence of a right, and a real, immediate threatened irreparable injury to that right. The Complainant must show that an injunction is necessary to afford adequate protection of constitutional rights before it will issue.

In *Watson v. Buck,* 313 U.S. 387, 85 L. Ed. 1416 at 1423, the Court said:

> "Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. 'No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution

even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.' Beal v. Missouri P.R. Corp., 312 U.S. 45, 49, ante, 577, 579, 61 S. Ct. 418. A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statue. * * *"

In *Fitts v. McGhee, supra,* the Court said:

"* * * At the present term of the court, in *Harkrader v. Wadley,* 172 U.S. 148, 169, 170 (*ante,* 399), we said: 'In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state.' Again: 'Much more are we of opinion that a circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to enforce the criminal laws of such state.' Undoubtedly, the courts of the United States have the power, under existing legislation, by writ of habeas corpus, to discharge from custody any person held by state authorities under criminal proceedings instituted under state enactments, if such enactments are void for repugnancy to the Constitution, laws or treaties of the United States. But even in such case we have held that this power will not be exercised, in the first instance, except in extraordinary cases, and the party will be left to make his defense in the state court. *Ex parte Royall,* 117 U. S. 241 (29:868); *New York v. Eno,* 155 U.S. 89 (39:80); *Whitten v. Tomlinson,* 160 U.S. 231 (40:406); *Baker v. Grice,* 169 U.S. 284 (42:748). But the existence of the power in the courts of the United States to discharge upon habeas corpus by no means implies that they may, in the exercise of their

> equity powers, interrupt or enjoin proceedings of a criminal character in a state court. The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised and is under a duty to enforce the mandates of the supreme law of the land. *Robb v. Connolly*, 111 U.S. 624 (82:542). And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

See also *Bradford v. Hurt*, 84 F. 2d 722; *Reed v. Lehman*, 91 F. 2d 919.

The Maryland law does not prohibit the practice of naturopathy but allows any person who meets the qualifications necessary to secure a license to practice medicine to apply the principles of naturopathy in his practice. Certainly the two non-resident Appellants showed no deprivation of the constitutional rights because Kenneth Hitchcock was not permitted to practice naturopathy. They could be treated elsewhere or even in the State of Maryland by a practitioner of their choice who applied the modalities of naturopathy as long as he was properly licensed. It is only when a State is violating the constitutional rights of a person that that person may bring suit in the Federal courts against the State. In this case, there has been only a vague and very general allegation of the violation of Appellants' constitutional rights. No facts were set out or offered to

sustain the allegations. See *Dent v. West Virginia, supra; Graves v. Minnesota, supra; Fitts v. McGhee, supra; Great Northern Life Insur. Co. v. Read, supra.*

The Appellants also asked the Court to declare and decree that the practice of naturopathy in the State of Maryland should be confined to naturopaths who were trained and skilled in the theory and practice of naturopathy, and should not be engaged in by practitioners of any other system of the Healing Art. That was a request for the Trial Court to act as the Legislature. The Courts should not usurp the function of the Legislature by making judicial law.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Appellants failed to show in the court below that Appellees, by enforcing the Medical Practice Act, or that the Medical Practice Act, violated any of their constitutional rights, and the Motion to Dismiss filed therein by the Appellees was properly granted. The questions presented are so unsubstantial as not to need further argument. Therefore, this Motion to Affirm should also be granted and the costs of this cause should be assessed against the Appellants.

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